No. 3580

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error.

vs.

MIKE KOSO,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Arizona

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ADDITIONAL STATEMENT OF THE CASE

Answer was filed March 22, 1918, after which, on January 18, 1919, defendant filed its motion supported by affidavit for security for costs, which motion was submitted to the court February 6, 1919 (Tr. of Rec., p. 17), the same being overruled August 4, 1920, without an exception being saved to the action of the Court.

In the trial of the case, the evidence showed that the defendant in error had been knocked down by rock falling from the roof of the mine, which rock struck him on the back and shoulders injuring him to the extent of compelling him to lie where he fell for fifteen minutes or half an hour. (Tr. of Rec., p. 34.) Afterwards the cage came down and the shift boss came from the 1300 foot level and put the defendant in error in the cage and took him to the dry house, that "they" pulled off his clothes and put on clean ones, and tried

to wash his neck and back, which were full of rocks, and he was taken in an automobile to the hospital. (Tr. of Rec., p. 35.) That the back and right shoulder of defendant in error were hurt, also his left foot and toe, and that the rocks in falling hit the whole length of his back which he indicated. (Tr. of Rec., p. 35.)

That at the time of trial (more than two years after the injury) his back and shoulders were sore; that he could move his limbs around at that time, and was able to do easy work, but could not perform hard work; that after working ten or fifteen days his back started to hurt "bad"; that he could stoop over, but it hurt him; at the time of the injury he was earning $5.50 per day; that he had always done hard work and could not do office work or clerical work. (Tr. of Rec., p. 35.)

Shortly after receiving the injury "they" took him to the dry house; "they" put him on a bench in the dry house and then the dryman took off his clothes; that he could not lift his hand above his head (Tr. of Rec., p. 36), and it was ten days before he could put on his clothes without help. (Tr. of Rec., p. 37.) He remained in the hospital about twenty days and then the doctor told him to get out. (Tr. of Rec., p. 35.) After being told to get out of the hospital he went to Phoenix and at Phoenix he was under the treatment of Doctor Nichols, who wanted to put him in the hospital, "but I had no money." (Tr. of Rec., p. 37.)

The medical expert's testimony was substantially: That he carefully examined the defendant in error and the history of the case, together with an examination of the body by sight, hearing and touch, and also with the fluroscope, and:

> "In the first place he has an hernia, a beginning hernia in the right side. He has lost about 50 per cent of the power of his right hand and that the examination showed an injury to the scapula or shoulder blade, also there had been an injury to the fifth lumbar vertebrae on the right side that had been repaired by nature and a bony ridge thrown out connecting the fifth lumbar vertebrae with the first sacral vertebrae. The bone injury to the scapula has united and there is more bony tissue at present than there was before he was injured, and that the injury consists of fractures."

after which Mortality Tables were admitted and the defendant in error rested. (Tr. of Rel., pp. 38-39.)

ARGUMENT

SPECIFICATION OF ERROR I

Answering the several specifications urged by the plaintiff in error in their numerical order, defendant in error respectfully submits to the Court that Specification of Error One is improperly assigned for the reason:

First: That the error, if any, complained of, in overruling the Motion for Security for Costs, was not saved, as no exception was taken to the action of the Court.

Second: The Motion for Security for Costs was submitted on February 6, 1919, and taken under advisement by the Court, and the same was not acted upon or any action taken until the 4th day of August, 1920, more than four months after verdict and judgment in the case. The plaintiff in error, defendant below, having failed to secure a ruling on its Motion for Security for Costs until after judgment, cannot complain at this

time, as its failure to secure a ruling of the Court before trial constitutes a waiver of its rights, if any, under its motion.

Welch v. Hannie, 112 Miss. 79; 72 So. 861.

Third: The final ruling of the Court was correct as the affidavit submitted by the plaintiff in error in support of its motion was not sufficient in that the same was made on information and belief, and was wholly insufficient in that it failed to state any of the necessary facts required by the statute. An affidavit upon information and belief cannot supply the place of a positive allegation.

1 R. C. L., p. 772.
Dyer v. Flint, 21 Ill. 80; 74 Rm. Dec. 73.
Archer v. Claffin, 31 Ill. 361.
Rollins v. Carroll, 81 Ill. 227.
Bassett v. Bratton, 86 Ill. 158.

The failure of the plaintiff in error to have the court pass on its motion for security for costs before judgment, constitutes a waiver of the motion and all its rights thereunder; its failure to save an exception to the action of the Court when taken leaves it in a position where it cannot, in this Court, assert or predicate any error upon the rulings of the Court. Moreover, its affidavit submitted being insufficient, the action of the Court was right and no error committed in its ruling.

SPECIFICATION OF ERROR II

This error is improperly assigned, the complaint consists of two counts. To this complaint demurrers were interposed:

First: To the complaint in its entirety.

Second: Separately to the first count; and

Third: Separately to the second count.

Plaintiff in error complains that the Court erred in overruling *or failing to act* upon the demurrer interposed by the defendant in error to the whole complaint. The Court did not overrule the demurrer to the complaint, certainly the plaintiff in error cannot complain of the *failure to act upon the demurer*, having proceeded to trial without obtaining a determination of a demurrer or motion is a waiver of such demurrer or motion, except only that the complaint or declaration des not state facts constituting a cause of action, and the latter is not asserted; moreover, it appears that the plaintiff in error obtained leave to file an amended answer, which, however, was not filed, but instead thereof proceeded to trial.

In argument in this Court the Statute of Limitations is sought to be invoked, but wherein does, in the record, such claim or assertion appear to have been made in the Court below? Or, what adverse ruling of the Court below is drawn in question, of which plaintiff in error can here complain? It is not improper to remark, as passing comment, that the procedure here adopted, of stating the cause of action in two counts, was not new and novel; counsel for plaintiffs in this class of actions being uncertain as to the ultimate determination of the constitutionality of the Arizona Employer's Liability Act did uniformly state such causes of action in two counts.

Arizona Eastern Railroad Co. v. Bryan, 18 Ariz. 106.

SPECIFICATION OF ERROR III

Here again we ask what adverse ruling of the

Court below is drawn in question by this Assignment of Error? Counsel for defendant in error offered certain X-Ray photographs; perhaps they were not sufficiently identified to permit their introduction; counsel for plaintiff in error objected thereto and the Court sustained the objection. If this be error, then, indeed, most all cases wherein improper evidence was offered, and though rejected, be reversed.

The plaintiff in error had the opportunity to request from the trial Court an admonition to the jury, which it failed to request. Again, it had the opportunity to present such error or impropriety of counsel for the defendant in error to the trial Court for correction in its motion for a new trial; it failed to do so. Can the plaintiff in error here, for the first time on appeal, assign error of conduct, the propriety of which was not even mooted in the Court below?

SPECIFICATION OF ERROR IV

Under this head the plaintiff in error complains of the introduction of the American Mortality Tables into evidence.

It must be conceded that in general, the introduction into evidence of these Tables is no longer questioned.

> Wigmore on Evidence, Vol. 3, Sec. 1698, page 2178.

The plaintiff in error, as we understand his brief, raises two objections upon which he predicates supposed error:

First: That there was no sufficient evidence in the record to show that the defendant in error was within

the "class" to which the particular tables were applicable, and,

Second: That there was no evidence of permanent injury to the defendant in error.

Neither of these objections were raised in the trial Court. The objection raised in the trial Court was that the Tables do not apply to those engaged in mining occupations.

But, as to the merit of these objections, the first, upon analysis we find is based upon the hypothesis that as a condition precedent to the introduction of the Tables a party must show, affirmatively, his previous habits. We take it that the plaintiff in error means by this that defendant in error in the instant case, must have shown affirmatively that he was a man of good moral habits; yet, we venture the assertion, had defendant in error gone so far as to have attempted to make such a showing, the plintiff in error, in indignation would have arisen to protest against the admissibility of such irrelevant and immaterial matter,—and quite properly so. We have found, from a perusal of the cases cited by the plaintiff in error in his brief, that the word "habit" or "habits" has been used in two or three instances, but we assert that such words, when used in the cases cited, were used in the sense of depicting a phase of physical hardihood, and were in no sense intended to be understood as opening up the avenue of "moral standing." We can not appreciate and frankly do not understand the position of the plaintiff in error, with reference to this part of his contention, less the same results from a confusion of ideas. It were a hard rule, indeed, which would require, as a condition precedent to the introduction of mortality tables, that the

party seeking such introduction would have to show that he was a man of good moral habits—and such a contention, indeed, finds support neither in logic nor at law.

It may be said, wth some degree of force and logic, that the prior good health of the party seeking the introduction of the tables must be shown, but we do not concede that this showing must be detailed over any given period of time in the past. We assert, on the contrary, that when the party seeking to introduce the tables, has testified that before the injury he was a man in good health, and where, as in this case, that evidence stands uncontradicted on the record, that there is a resultant presumption of fact which aids the bare "dogmatic" statement.

The defendant in error, testifying on direct examination during the progress of the trial, stated:

> "I have been a sailor, and in mining the last 18 years. (Tr. of Rec., p. 34.)
>
> "Before this accident I was feeling good, and had nothing on my back and shoulders." (Tr. of Rec., p. 35.)

We believe the above testimony to have been a sufficient predicate for the introduction of the tables upon the specific objection taken under the first point raised.

As to the second point, we concede that before mortality tables may be used in evidence, that there must be some evidence, something beyond mere fragmentary evidence, of the permanent nature of the injury.

We submit that the evidence adduced at the trial of this cause in the Court below, having particular rela-

tion to the injury of the defendant in error tended to show a permanent injury.

Dr. Wyn Wylie, testifying on behalf of the defendant in error, stated:

> "In the first place, he has an hernia, a beginning hernia on the right side. Hernia is another name for rupture. He has lost about 50 per cent of the power of his right hand. There has been an injury to the scapula or shoulder-blade, and there has been an injury to the fifth lumbar vertebrae on the right side, that has been repaired by nature, and a bony ridge thrown out connecting the fifth lumbar vertebrae with the first sacral vertebrae. The injury to the scapula, the bone injury, has united and there is more bony tissue there at the present than there was before he was injured. This injury consisted of fractures." (Tr. of Rec., pp. 38-39.)

This testimony was affirmative and positive in its nature. When we say that a man has lost fifty per cent of the power of his right hand, we must surely mean that fifty per cent of the power of that right hand is gone forever,—lost beyond recovery.

It has been repeatedly held by the Courts that, where permanency of injury is controverted, the mortality tables may be admitted to be considered by the jury in case they find that the injury is permanent.

> Richmond, etc., R. R. Co. v. Garner, 91 Ga. 27: 16 S. E. 110.
>
> Blair v. Madison County, 81 Iowa 313; 46 N. W. 1093.
>
> Wilkins v. Flint, 128 Mich. 262; 87 N. W. 195.

As questions relating to instructions given with re-

spect to these mortality tables are taken up at a later time, in the brief of plaintiff in error (Specifications of Errors VI, VII and VIII), we leave the argument of the above objections, believing, as we do that all possible safeguards were thrown about the submission of the question of the probative force of the mortality tables in the instruction of the court upon the subject.

SPECIFICATION OF ERROR V

We concede that where a recovery is sought under the provisions of the Employer's Liability Act of the State of Arizona, that the plaintiff must show that the accident was not caused by his own negligence. But in this connection we assert that it is supercilious to contend that proof of such a "negative pregnant" can be made by any other means than to show the conditions, facts and circumstances surrounding the accident. At the close of the plaintiff's case, the plaintiff in error (defendant) did not move for a directed verdict. It then must have deemed the plaintiff's proof sufficing. Surely, the defense, at most, only created a conflict. But, we submit further that, in this particular case it apepars with reasonable certainty that it was not the negligence of the defendant in error which caused the accident. The accident was one commonly known as a cave-in, the defendant in error testified that he was at work shoveling muck into a mine car, and while he was bending to get a shovel full of debris or muck from the floor of the tunnel at the particular point at which he was working, he was injured by rock falling from the roof of the tunnel without warning. The defendant in error further testified that he was directed to work at this particular point by the foreman in charge (Tr. of

Rec., p. 34), and that at the place where he was working it was soft ground and not timbered.

What more could have been required, and where is counsel for plaintiff in error leading us? Surely no clearer case could be made under the Employer's Liability Act, and most assuredly no firmer proof of freedom from negligence on the part of the defendant in error could have been made. Only could the Court have directed a verdict by arbitrarily assuming that the defenadnt in error was guilty of negligence in working at the place where he was directed to work.

We submit it would be incomprehensible that, before an employee can recover under the terms of the Employer's Liability Act, he must show freedom from negligence in any larger sense than was shown in the trial of this cause. Besides, the question of whether or not the negligence of the defendant in error caused the accident, was a question of fact to be submitted to the jury under proper instructions of the Court, and the finding of the jury in that respect is conclusive. The instruction given by the trial Court in this behalf was clear, explicit, sound and most advantageous to the plaintiff in error. (Tr. of Rec., p. 49 top.)

It must be borne in mind that assumption of risk and contributory negligence are, by the substantive law of the State of Arizona, in all cases whatsoever, questions of fact for the jury.

Section 5, Article 18, Arizona Constitution.

SPECIFICATIONS OF ERROR VI, VII AND VIII

These specifications question the soundness of the trial Court's charge to the jury with reference to the Mortality Tables. The exception taken to the charge

is specific and did not direct the trial Court's attention to error, if any, now urged; therefore, even if the argument be of merit it was not a proper assignment of error under Rule 10 and could not be the basis of specifications of error in this Court. The exception is as follows:

> "MR. CORNICK—We desire to note an exception to *one* part of Your Honor's charge, and to make two requests. We desire to note an exception to that part of Your Honor's instructions with regard to the Mortality Tables as evidence in this case, *because we believe that under Your Honor's charge the instruction presumes the permanency of the injury.*" (Tr. of Rec., p. 56.)

Therefore, the sole inquiry here should be limited as to whether or not this exception was well taken and whether or not the charge assumed "permanency of injury."

Counsel say:

> "The whole tendency of the instructions of the Court, taken as a whole, and particularly with reference to mortality tables, showed an assumption that there was evidence of permanent injury." (Brief, p. 36.)

Counsel for plaintiff in eror have wronged the trial Court; we cannot conceive how the trial Court could have more jealously safeguarded the rights of the plaintiff in error.

> THE COURT—"Well, if you or any one else so understood me, I desire to correct it now, because I didn't assume, and I don't assume, that the plaintiff has been permanently injured or injured at all, that is a question for the jury."

MR. CORNICK—"Then we desire further, Your Honor, to note an exception—"

THE COURT—"Pardon me, but I do say that if the jury does come to the conclusion that the injuries are permanent, then they may consider the Mortality Tables, if they come to the conclusion that the injuries are temporary and not permanent, then the Mortality Tables, as to his erpectancy of life, should not be considered at all. Any further erceptions?" (Tr. of Rec., pp. 56-57.)

That the Court had assumed permanency of injury was not anywhere intimated by counsel for plaintiff in error either during the progress of the trial, or during the taking of the plaintiff in error's exceptions to the charge of the Court.

Indeed, the Court below did not assume in the charge or in the introduction of the tables that the plaintiff was permanently injured. In the charge, the Court commenting upon the measure of damages stated to the jury that such Mortality Tables were evidence:

"*If* the injury is of a permanent character—"

and thereafter also followed the specific directions quoted at length.

In the objection to the introduction of the Mortality Tables, certainly no objection of an assumption by the Court of permanency of injury does appear (Tr. of Rec., pp. 39-40), the only objection thereto urged being that they were not admissible because the plaintiff was shown to have been engaged in a hazardous occupation and that, therefore, the plaintiff would not fall within the law of averages. In this the trial Court certainly protected the plaintiff in error, for the jury were told that the fact that the defendant in error had been en-

gaged in a hazardous occupation was a circumstance to be by the jury taken into consideration as tending to show that the expectancy of life was less than the tables would indicate.

How could the trial Court have been fairer to the plaintiff in error?

Certainly it cannot be contended that there was no evidence tending to show permanency of injury. Plaintiff in error, in objecting to the introduction of the Mortality Tables (Tr. of Rec., p. 39), was specific and did not in the least question the admissibility of the tables because no evidence had been introduced tending to show permanency of injury, but was limited to the objection that they do not apply where the person injured was engaged in a hazardous occupation. If any one assumed permanency of injury of the defendant in error it was not the trial Court in its charge to the jury, or in the admission of these tables, but it was counsel for plaintiff in error who, by specifically objecting to the introduction of the tables and not objecting on the grounds that there was no evidence tending to show a permanency of injury, must necessarily then have assumed that such evidence was present in the record.

Finally, it appears that this assignment of error was made a basis for the motion for new trial. The Bill of Exceptions does not indicate an exception to the action of the trial Court denying the motion for new trial. True, the Minute Entries overruling the motion for new trial states that an exception was taken by the plaintiff in error to the overruling of the motion for new trial but the plaintiff in error did not see fit to include such error, if any, in the Bill of Exceptions signed by the Judge.

SPECIFICATION OF ERROR IX

Hereunder the plaintiff in error seeks to question the correctness of the instruction given by the trial Court upon the question of damages. No exceptions thereto were taken, and hence, even if of merit, cannot be the basis of an assignment or specification of error in this Court.

SPECIFICATIONS OF ERROR X AND XI

Plaintiff in error, under this specification complains of what he terms the excessiveness of the verdict rendered by the jury and bases his contention upon the dogmatic statement that there was no evidence tending to prove or proving injury of a permanent character. The record is a complete refutation of such an argument. (Tr. of Rec., pp. 34-37 and pp. 37-39.)

Here, a man who had been a sailor and miner for the past 18 years of his life, occupations demanding great physical endurance and agility, testified that he could not now engage in the avocations which he had followed in the past 18 years, and could not perform or do hard manual labor of any kind. This statement on the part of the defendant in error is corroborated by Dr. Wyn Wylie's testimony given in the court below. During the course of this brief we have had occasion to refer to that testimony. Dr. Wylie stated positively that fifty per cent of the power of the right arm of defendant in error was lost. Will it be presumed that a man can follow the occupation of mining or that of a sailor after the destruction of fifty per cent of the power of his right arm? Or is it not more reasonable to deduce from this fact that the defendant in error was

permanently injured and hence that the earning power of the defendant in error was very materially and permanently decreased?

But if this were not enough to support the verdict rendered, then we suggest to the Court that the defendant in error suffered other serious injuries of a permanent nature. It was shown at the trial that the defendant in error sustained an injury to the scapula or shoulder blade, a fracture; and that the defendant in error also sustained an injury to the fifth lumbar vertabrae on the right side. (Tr. of Rec., p. 39 top.)

The above testimony taken in connection with the statement of the defendant in error that he was unable to do hard work, and that it hurt him to stoop over, should, in our opinion, form a sufficient predicate upon which the jury might well have concluded that the defendant in error was in fact seriously and permanently injured in his person.

The plaintiff in error has cited some seventeen cases to demonstrate that juries have, under the particular facts of these individual cases, allowed a much smaller amount for a similar or greater injuries than the defendant in error sustained. The adjudicated cases upon the subject of inadequate and excessive damages are innumerable. It would seem to us to be idle waste of time to confront this Court with the citation of cases holding under given state of facts that a certain sum was inadequate or was excessive, since it occurs to us that whether or not damages in any particular case are excessive or inadequate is dependent upon the particular facts of that case.

We conclude, therefore, with the statement that both the Court and the jury have passed upon the dam-

ages in this cause, and seemingly neither concluded that the amount awarded was excessive. No exception was taken to the refusal of the trial Court to grant a new trial.

In conclusion, we respectfully submit that the judgment of the lower Court should, in all things, be confirmed.

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